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Supreme Court, U.S.
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No. 97-656

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CENTRAL OFFICE TELEPHONE, INC.,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether the district court, after granting judgment as a matter of law against a portion of a jury's damages award, correctly determined based on the record that the portion of the jury's verdict that was not overturned was $1,154,000, and thus entered a judgment for that amount, rather than order a new trial.

LIST OF PARTIES AND AFFILIATES

The parties listed on the caption were the only parties to the proceedings below. American Telephone and Telegraph Co. has, since the inception of this case, changed its name to AT&T Corp.

Pursuant to Supreme Court Rule 29.6, AT&T Corp. declares that it has no parent company. AT&T Corp. has an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
General Magic, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd. (Hong Kong)

AT&T Corp. owns an interest in the following non-publicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

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REASONS FOR DENYING THE PETITION

This is the second petition for a writ of certiorari that seeks review of the Ninth Circuit's judgment in *Central Office Telephone, Inc.* v. *American Telephone and Telegraph Co.*, 108 F.3d 981 (CA9 1997).

In the first petition, AT&T Corp. ("AT&T") asked the Court to review and reverse the divided panel's holding on liability. It demonstrated that the panel's holding (over Judge Brunetti's dissent) that a common carrier could be held liable, under state law, for breaching alleged promises to provide better service than required by its F.C.C. Tariff is contrary literally to a century of decisions of this Court and other courts of appeals—and

should be summarily reversed. *AT&T Corp.* v. *Central Office Telephone*, No. 97-679.

By contrast, the instant petition is filed by the plaintiff Central Office Telephone ("COT"). COT assumes that liability was correctly determined, and asks the Court to review the question whether the district court's and the Ninth Circuit's holdings concerning the amount of damages somehow violated the Seventh Amendment of the Constitution. Even if liability had been properly determined, however, this second petition is frivolous.

First, the Ninth Circuit's rejection of COT's Seventh Amendment claim was simply a correct application of well-settled principles. The holding does not conflict with any decisions of this Court or of another court of appeals. In particular, COT challenges the district court's decision to grant AT&T judgment as a matter of law concerning the portion of a jury's $13 million damages verdict that covered the period after the alleged contract ended and to enter judgment in the amount of $1,154,000. Although the jury's damages award was in the form of a general verdict, the district court found, based on its review of the record, that the jury "obviously" had awarded $1,154,000 for the period of time while the "contract" was to be in effect and that this amount was unaffected by the error of law. Pet. App. 53. As COT does not dispute, it is well settled that Rule 50 of the Federal Rules of Civil Procedure gives federal district courts the authority, consistent with the re-examination clause of the Seventh Amendment, to enter a judgment that excludes the "identifiable" portion of a jury's damages that could not be awarded as a matter of law, rather than to order a new trial. The district court's decision here, therefore, simply applied settled legal standards to the unique facts of the case. There is no conflict between the legal standard that the Ninth Circuit applied and the legal standards applied in decisions of any other court of appeals.

Second, even if the Ninth Circuit had accepted COT's Seventh Amendment claim, the court would have been required to order a new trial on liability as well as damages under this Court's holding in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), and its numerous progeny. That would benefit AT&T and harm COT.

1. As more fully explained in AT&T's Petition (No. 97-679), COT is a reseller of long distance service that it purchases from long distance carriers at one rate and then provides at marked-up rates to COT's own customers. COT began purchasing and reselling AT&T's Software Defined Network ("SDN") in April of 1990. But COT terminated its SDN service in September 1992 after suing AT&T for previously violating alleged oral or implied agreements generally to provide better service than required by AT&T's tariff. Pet. App. 11-13.

The district court denied AT&T's motion to dismiss these state law claims under the filed tariff doctrine. At the jury trial on these claims, COT presented testimony from a single witness on the issue of damages, an accountant named Thomas Hainline. He presented a "lost profit study," which extrapolated from COT's SDN experience in reselling SDN during a seven-month period in 1990. On the basis of this experience, Hainline testified that, absent a breach of AT&T's extra-tariff agreements, COT would have realized " 'approximately 13 million' in past and future profits" through the year 2000. Pet. App. 42. The jury found in favor of COT and, consistent with Hainline's testimony, awarded $13 million in damages. Pet. App. 78.

2. The district court granted, in part, AT&T's motion for judgment as a matter of law. Foremost, the district court held that the applicable state law precluded COT from recovering lost profits for the period after it terminated the "contract" in September 1992. Pet. App. 63-65.

The district court further held that, for at least nine separate reasons, COT's "lost profits" evidence "clearly [was] not sufficient," even when viewed "with all reasonable inferences taken in favor of [COT]," to support any finding of damages for the period after COT terminated its service in September 1992. Pet. App. 61, *id.* 53-60. By contrast, although it held it was "a close question," the district court concluded that the evidence was sufficient "to support the jury's award of lost past profits up to COT's termination of its SDN sales in September 1992." Pet. App. 61. Reviewing the record of the trial, the district court noted that COT's damages witness, in coming to a total lost-profits calculation of "approximately 13 million" up to the year 2000, had calculated lost profits for the period through September 1992 as $1,154,000. Pet. App. 53. The district court then found that "[t]he jury's verdict of $13,000,000 [was] obviously based upon that total," and entered an amended judgment for $1,154,000. Pet. App. 53, 65.

The Ninth Circuit affirmed this decision and rejected COT's Seventh Amendment challenge. The Ninth Circuit noted that "Rule 50 of the Federal Rules of Civil Procedure allows a court to set aside the verdict of the jury and enter judgment as a matter of law, and has been held to be constitutionally compatible with the Seventh Amendment." Pet. App. 24. The Ninth Circuit also rejected COT's claim that the district court's judgment as a matter of law was improperly based "on a truncated trial record," noting that, "contrary to COT's position," the district court had fully "considered the entirety of the testimony of COT's expert." Pet. App. 24.

3. As COT's Petition acknowledges (p. 6), it is well settled that entry of judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure does not run afoul of the Seventh Amendment right to jury trial. *See Galloway* v. *United States,* 319 U.S. 372, 389

(1943) (holding that a claim that the Seventh Amendment deprives federal courts of power to direct a verdict for insufficiency of evidence "has been foreclosed by repeated decisions made here consistently for nearly a century"). Similarly, this Court long ago recognized that, when judgment as a matter of law is warranted for some, but not all, of the damages entered by a jury, a federal court has authority, consistent with the Seventh Amendment, to enter judgment for an identifiable portion of the jury's original damage award, rather than order a new trial as to the entire case. *See Insurance Co.* v. *Piaggio*, 83 U.S. (16 Wall.) 378, 386-88 (1872) (holding that judgment should be modified to disallow a portion of damages awarded by jury where it is "apparent in the record" that this portion alone was in error as a matter of law); *New York, Lake Erie & W. R.R.* v. *Estill*, 147 U.S. 591, 622-23 (1893) (ordering that judgment be reduced by the amounts attributable to interest charges, which were improperly imposed as a matter of state law).

The courts of appeals also consistently have applied the rule that, where it is apparent as a matter of law from the record that a portion of a jury award is improper, a court may modify the judgment to eliminate that portion of the award, rather than ordering a new trial. *See* 10 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2815, p. 159 (2d ed. 1995) (citing cases and noting court's authority to enter judgment for reduced damages in this circumstance). Numerous court of appeals decisions have uniformly so held.[1]

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[1] For example, in *Garrett* v. *Faust*, 183 F.2d 625, 629 (CA3 1950), the Third Circuit disallowed that portion of the jury's damage award attributable to breach of contract and fraudulent misrepresentation claims that were unsupported by the evidence, but held that there was "no reason why" the "balance of the verdict, amounting to $3,609.10, being clearly identifiable as representing the jury's determination of the amount due[,]" "should not stand." *See also McKinnon* v. *City of Berwyn*, 750 F.2d 1383, 1392 (CA7 1984) (noting that a federal court may set aside a jury verdict and

Indeed, even the cases on which COT relies (Pet. 10-12) acknowledge a federal court's authority to enter a judgment for a reduced amount of damages "where it is apparent as a matter of law that certain identifiable sums included in the verdict should not have been there." *Bereda* v. *Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 55 (CA3 1989); *see Nissho-IWAI Co.* v. *Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1547-48 (CA5 1984) (noting that a new trial was required only because the court could not tell from the record how much of the jury's award was attributable to a time period for which no damages should have been awarded). COT thus recognizes that a federal court may, consistent with the Seventh Amendment, reduce a jury verdict on damages when based on "a judgment as a matter of law pertaining to a discernibly separate and distinct issue or award." Pet. 13.

These are the legal standards the district court and Ninth Circuit applied to the particular facts of this case. COT's Petition makes explicit that its disagreement with the district court and Ninth Circuit is not with these legal determinations, but with their application. The linchpin of COT's claim is its inherently factbound assertion that, "[*i*]*n this case,* the verdict does not clearly indicate how it was arrived at or what it contemplates." Pet. 12 (emphasis added). However, the district court and the Ninth Circuit came to the exact opposite conclusion based on their review of the evidence. The district court found that

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"fix the proper level of damages" if "the plaintiff is entitled to a particular amount of damages as a matter of law"); *Westchester Fire Ins. Co.* v. *Hanley*, 284 F.2d 409, 418 (CA6 1960) (ordering reduction of jury award by 25% required as a matter of law by apportionment clause of insurance policy, where "[i]t [was] obvious that the jury made no reduction of the damages found by applying the apportionment clause"); *State of Washington* v. *United States*, 214 F.2d 33 (CA9 1954) (affirming trial court decision setting aside verdict of $581,721.91 because it was not based on sufficient evidence and entering judgment in the amount of $1.00 as nominal damages).

the $13,000,000 damages award was "obviously based upon" testimony of COT's expert where he calculated lost profits up to September 1992 as $1,154,000, and lost profits for the following seven years as $12,059,800, for a total, as the expert testified, of "approximately $13,-000,000." Pet. App. 53. Petitioner COT's claim, therefore, raises nothing more than a dispute over whether the identifiable portion of damages awarded up to September 1992 "obviously" was $1,154,000. Such a factual question resolved by both lower courts does not merit review by this Court.

Moreover, even if the district court had erred in making its factual determination that the jury necessarily had set damages for the period up to September 1992 at $1,154,-000, this error redounds to the benefit of Petitioner COT. The only appropriate alternative available was to order a new trial on liability as well as damages—which could have resulted in a finding of no liability against AT&T, and in fact, given AT&T's substantial counterclaims, could have resulted in an award of substantial damages for AT&T. In this regard, there is no basis for COT's repeated assertions that the district court, under these circumstances, "has no alternative" but to order a partial new trial limited to the issue of damages (Pet. 10, 18), rather than ordering a new trial as to all issues. Partial new trials are permissible only in narrowly restricted circumstances, as this Court made clear in *Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931):

> "[A] partial new trial . . . may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. . . . Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial."

Here, like in *Gasoline Products*, issues of damages and liability are closely interwoven, and thus there could not properly be a retrial limited to damages only.

For example, as in *Gasoline Products*, a jury on retrial could not determine COT's damages "unless also advised of the terms of the contract," 283 U.S. at 499, which would be impossible here because the original jury was allowed to determine terms of various "side deals" that formed the basis for COT's state-law claims, and did not return a special verdict concerning the terms of such side deals. *See also, e.g., Ajax Hardware Mfg. Corp.* v. *Industrial Plants Corp.*, 569 F.2d 181, 185 (CA2 1977) (ordering new trial on both liability and damages where it "cannot be said that there 'clearly' was no relationship" between the erroneous findings and those which otherwise would have been upheld); *Camalier & Buckley-Madison, Inc.* v. *Madison Hotel, Inc.*, 513 F.2d 407, 422 (CADC 1975) (ordering new trial on both liability and damages because the court "lack[ed] reasonable assurance" that the sustainable findings were not tainted); *Williams* v. *Slade*, 431 F.2d 605, 608 (CA5 1970) ("[A] court may properly award a partial new trial only when the issue affected by the error could have in no way influenced the verdict on those issues which will not be included in the new trial."); *Romer* v. *Baldwin*, 317 F.2d 919, 922-23 (CA3 1963) (holding that partial new trials should be granted " 'only in those cases where it is plain that the error which has crept into one element of the verdict did not in any way affect the determination of any other issue,' " (quoting *Thompson* v. *Camp*, 167 F.2d 733, 734 (6th Cir. 1948)).

4. Petitioner COT also asserts that this Court should review whether, in determining the sufficiency of the evidence under Rule 50 of the Federal Rules of Civil Procedure, a trial court properly can exclude from its consideration evidence that was erroneously admitted at trial. Pet.

19-24. That issue, however, is not raised in this case. The district court plainly *did* consider all the evidence presented in reviewing AT&T's Rule 50 motion for a judgment as a matter of law, and thus did not, as COT wrongly asserts, rely on a "truncated record," Pet. 19.

Petitioner COT's claim relies on decisions of some courts of appeals holding that a trial court may not grant a judgment notwithstanding the verdict by ignoring evidence admitted at trial on the ground that the admission was in error. *See Midcontinent Broad. Co.* v. *North Cent. Airlines, Inc.*, 471 F.2d 357, 358-59 (CA8 1973); *Jackson* v. *Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 696 (CA11 1993). Here, neither the district court nor the Ninth Circuit disagreed with these decisions. Indeed, the Ninth Circuit expressly accepted rule that "a trial judge must consider all evidence submitted in ruling on a motion for judgment as a matter of law," and cited with approval the Eighth Circuit's *Midcontinent Broadcasting* opinion. Pet. App. 24. COT's claim that the Ninth Circuit's opinion is in conflict with these other circuits (Pet. 23), therefore, is simply wrong.

In an effort to create a conflict where there is none, COT repeatedly mischaracterizes the district court's decision as having been based on a "truncated record," and having hinged on the admissibility of COT's damages testimony. Pet. 20-23. In fact, the district court's decision granting judgment as a matter of law hinged on the determination that an award of damages after September 1992 was barred by state contract law (Pet. App. 63-65) and that there "clearly" was insufficient evidence to support any damages award for the period after September 1992 (Pet. App. 61). In making this determination, the district court expressly and in great detail considered the testimony of COT's damages witness and found that this testimony provided no support for any such damages. Pet. App. 52-65. The district court's determination, there-

fore, is fully consistent with each of the court of appeals decisions cited by COT, where the courts deemed it improper for a trial court to *exclude* from their consideration of the sufficiency of evidence any testimony that they later determined was erroneously admitted.[2]

Nor is there any unfairness in this outcome, as COT claims. Pet. 24-27. The burden was on COT to prove damages, and COT had full opportunity to introduce whatever evidence it deemed necessary to meet its burden. COT chose only to present a single witness on this issue, whose testimony, as the district court found, was entirely lacking on a series of separate grounds even when viewed in a light most favorable to COT. There is no "unfairness" in finding that a party has submitted insufficient proof to meet its burden, without granting that party a second chance to present additional evidence.

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[2] *See Midcontinent Broad. Co.* v. *North Cent. Airlines, Inc.*, 471 F.2d 357, 358 (CA8 1973) ("Although the trial court found insufficient evidence to sustain the verdict, it did so only after excluding plaintiff's expert testimony which had been presented to the jury."); *Jackson* v. *Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 695 (CA11 1993) ("The district court held that when the expert's testimony was struck from the record, [plaintiff] had failed to make out a prima facie case . . . ."); *Douglass* v. *Eaton Corp.*, 956 F.2d 1339, 1343 (CA6 1992) (After determining that certain evidence should have been excluded at trial, "[t]he district court held that the remaining evidence was insufficient to support the jury verdict."); *Dixon* v. *International Harvester Co.*, 754 F.2d 573, 580 (CA5 1985) (Plaintiff's expert "testimony should have been considered by the district court in examining the sufficiency of the evidence," because a trial court "cannot enter judgment on a record altered by the elimination of incompetent evidence."); *Persinger* v. *Norfolk & W. Ry.*, 920 F.2d 1185, 1189 (CA4 1990) ("The district judge determined that, other than [expert testimony that should have been excluded], [plaintiff] had not presented any evidence of negligence.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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